

**UNITED STATES BANKRUPTCY COURT  
WESTERN DISTRICT OF NEW YORK**

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**In re:**

**CASE NO. 97-23199**

**H. PAUL BLOCK,**

**Debtor.**

**DECISION & ORDER**

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**FREDERICK C. FIERTHALER and  
KATHLEEN M. FIERTHALER,**

**Plaintiffs,**

**V.**

**AP #97-2263**

**H. PAUL BLOCK,**

**Defendants.**

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**BACKGROUND**

On August 25, 1997, the debtor, H. Paul Block (“Paul Block”) individually and as an officer and director of Mt. Morris Lumber and Hardware, Inc. (“Mt. Morris Lumber”) and Block Brothers Corporation (“Block Brothers”), filed a petition initiating a Chapter 7 case. On the schedules and statements required to be filed by Section 521 and Rule 1007, Paul Block indicated that: (1) he was a one-third shareholder of both Mt. Morris Lumber and Block Brothers; (2) he had monthly income of \$1,500.00 and monthly expenses of \$1,450.00; and (3) he had unsecured indebtedness of in excess of \$709,000.00, including an unknown amount claimed by Frederick C. and Kathleen M. Fierthaler (the “Fierthalers”) which they had asserted in a counterclaim interposed in a pending collection lawsuit commenced against them by Block Brothers (the “State Court Action”).

On November 7, 1997, the Fierthalers and Genesee Reserve Supply, Inc. (“Genesee Reserve”) filed separate motions (the “Extension Motions”) which requested that: (1) they be authorized to conduct Rule 2004 examinations of Paul Block; and (2) the Court extend the December 1, 1997 “Bar Date” for the filing of Complaints objecting to the discharge of Paul Block or the dischargeability of his debts to the Fierthalers and Genesee Reserve. The Extension Motions indicated that the movants had many questions and concerns regarding the pre-petition financial relationships and transactions between Paul Block and Mt. Morris Lumber, Block Brothers and insiders of those corporations, including family members. On the November 19, 1997 return date of the Extension Motions, the Court authorized the movants to conduct 2004 examinations of Paul Block, but denied the requests to extend the Bar Date. The Court found that Genesee Reserve and the Fierthalers had not exercised the required due diligence before the expiration of the Bar Date and had not established the required “cause” to obtain an extension of the Bar Date. See unpublished decision in *In Re Hart* (Case #98-23000, dated May 4, 1999) (“*Hart*”).

On December 3, 1997 and March 24, 1998, the Court extended the Bar Date for Paul Block’s Trustee (the “Trustee”) to file a complaint objecting to his discharge under Section 727(a). The Trustee had indicated to the Court that he was waiting for requested information which he had concerning the ownership interests of Paul Block in Mt. Morris Lumber and Block Brothers and for Paul Block to file his 1996 income tax returns.<sup>1</sup>

On November 25, 1997, the Fierthalers filed a complaint initiating an adversary proceeding against Paul Block (the “Adversary Proceeding”). The Complaint in the Adversary Proceeding

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<sup>1</sup>The Trustee did not file a complaint under Section 727(a) prior to the June 1, 1998 Extended Bar Date.

alleged that: (1) the Fierthalers believed that they had a claim against Paul Block for no less than \$111,043.80; (2) the basis for this claim against Paul Block was that under the supervision of Paul Block and his brother, L. Mark Block (“Mark Block”), who was also a one-third shareholder, Block Brothers constructed a home for the Fierthalers which had a dangerously defective foundation; (3) this dangerous and defective foundation had been concealed from the Fierthalers by Paul Block and Mark Block; (4) there were financial irregularities in the operation of Mt. Morris Lumber and Block Brothers, which included the fact that Block Brothers had reported gross income on its 1996 income tax return that was less than one-third of the amounts the Fierthalers paid it during that year; (5) there may have been diversions of business assets to Paul Block, or between Mt. Morris Lumber, Block Brothers and other family members of Paul Block; (6) on March 27, 1997, Paul Block had executed an Affidavit of Confession of Judgment (the “Confession of Judgment”) in favor of another brother, David Block, in the amount of \$155,195.00; and (7) an auction sale of the assets of Mt. Morris Lumber had taken place on May 3, 1997.

The Complaint further asserted that: (1) pursuant to Section 523(a)(2), the discharge of Paul Block’s indebtedness to the Fierthalers should be denied, based upon fraud; (2) pursuant to Section 523(a)(6), the discharge of Paul Block’s indebtedness to the Fierthalers should be denied, based upon his injury to the Fierthalers’ home and his conversion of the assets of Mt. Morris Lumber and/or Block Brothers; (3) Paul Block’s discharge should be denied, pursuant to: (a) Section 727(a)(2), because he had transferred or concealed assets of Mt. Morris Lumber and/or Block Brothers with the intent to hinder delay or defraud his creditors; (b) Section 727(a)(3), because of his concealment and failure to keep or preserve the required records from which his financial condition or business

transactions could be ascertained; (c) pursuant to Section 727(a)(4)(A), because he knowingly and fraudulently made a false oath and withheld information relating to his property or financial assets; and (d) Section 727(a)(5), because he failed to satisfactorily explain the loss or deficiency of assets to meet his liabilities.

Paul Block interposed an Answer, signed only by his attorney, which consisted of a general denial. On November 10, 1998, after extensive discovery was conducted, Paul Block filed a motion for summary judgment (the “Motion for Summary Judgment”).

The Motion for Summary Judgment<sup>2</sup> and an accompanying Memorandum of Law (the “Memorandum of Law”) alleged that: (1) the Fierthalers’ Section 523(a)(2)(A) cause of action for fraud should be dismissed because: (a) it had not been finally adjudicated that there was even an indebtedness due from Paul Block to the Fierthalers which could be determined to be nondischargeable; (b) Paul Block never received any money, property or services as a result of the alleged fraud, only Block Brothers received money from the Fierthalers; and (c) the allegation that Block Brothers, under the direction of Paul Block, constructed the foundation of the Fierthalers’ home in a dangerously defective manner which was fraudulently concealed from the Fierthalers, did not meet the pleading specificity requirements of Rule 9(b) of the Federal Rules of Civil Procedure; (2) the Fierthalers’ Section 523(a)(6) cause of action should be dismissed because: (a) there was no evidence that Paul Block willfully and maliciously caused injury to the Fierthalers or their property; and (b) if Block Brothers or its subcontractors constructed a defective foundation, it was constructed negligently or in breach of its contract with the Fierthalers, not willfully and maliciously; (3) The

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<sup>2</sup> The Motion for Summary Judgment, signed only by Paul Block’s attorney, did not include a sworn Affidavit by Paul Block.

Fierthalers' Section 727(a)(2)(A) cause of action should be dismissed because: (a) there was no evidence that Paul Block transferred or concealed any of his own assets with intent to hinder, delay or defraud creditors; and (b) the allegations that Paul Block may have transferred or concealed the business assets of Mt. Morris Lumber or Block Brothers did not meet the requirements of Section 727(a)(2)(A); (4) The Fierthalers' Section 727(a)(3) cause of action should be dismissed because Paul Block, to the satisfaction of his Trustee, had provided all material and requested documentation and records concerning his financial condition and business transactions; (5) the Fierthalers' Section 727(a)(4)(A) cause of action should be dismissed because there was no creditable evidence that Paul Block had fraudulently made a false oath; and (6) the Fierthalers' Section 727(a)(5) cause of action should be dismissed because the Fierthalers had failed to demonstrate that there were any specific assets of Paul Block lost, or that any such loss had not been satisfactorily explained.

On November 19, 1998, the Fierthalers filed a cross-motion for summary judgment (the "Cross-Motion"), which alleged that: (1) As a vice-president of both Mt. Morris Lumber and Block Brothers Corporation, Paul Block had a responsibility for maintaining the business records of those corporations, even though he had alleged that his brother, also a one-third shareholder, officer and director of those corporations, had always been in control and in possession of the business records of both corporations; (2) some of the checks which the Fierthalers had made payable to Block Brothers in connection with the construction of their home were deposited directly into the accounts of Mark Block or Mt. Morris Lumber; (3) Paul Block had received funds from Mt. Morris Lumber after the Fierthalers' checks had been deposited into the Mt. Morris Lumber account; (4) Mt. Morris Lumber made a number of payments on Paul Block's mortgage, and it purchased a vehicle used by

Paul Block; (5) Paul Block had made a false oath when he failed to disclose on his schedules rental income from several lakefront cottages; (6) Paul Block had made a false oath when he failed to disclose on his schedules or at his Section 341 Meeting of Creditors that he had a savings account; and (7) Paul Block had made a false oath when he testified that he wasn't receiving monies from Mt. Morris Lumber or Block Brothers when in 1995 and 1996 in excess of \$56,000 went into his Marine Midland accounts.

On November 24, 1998, Paul Block's attorney signed and filed a Reply Affidavit (the "Reply"), which alleged that: (1) the Fierthaler's Cross-Motion clearly indicated that Paul Block did not directly receive the proceeds of the alleged fraud on the Fierthalers, as required by legal authority in the Second Circuit, including *In Re Rifkin*, 142 B.R. 61 (Bankr. E.D.N.Y. 1992) ("*Rifkin*"); (2) even if Block Brothers or Mt. Morris Lumber made payments on Paul Block's mortgage, or purchased a company car which he drove, this did not constitute a transfer or concealment of his assets, as required by Section 727(a)(2); (3) the rental income which was alleged that Paul Block failed to report on his schedules was not his rental income, but was rental income from properties owned by Block Brothers; (4) Paul Block did not schedule the vehicle which he drove because it was titled to Block Brothers and he did not own it; (5) although the execution and docketing of the Confession of Judgment may have constituted a transfer of Paul Block's assets, he did not conceal the transaction when questioned about it; (6) the Fierthalers had failed to indicate any specific records which Paul Block failed to keep or provide that are material to his financial condition; (7) prior to the filing of his petition, Block lived off the compensation he received as an employee of Block Brothers and his modest savings; and (8) the affidavits interposed by the Fierthalers

concerning the construction by Block Brothers of the foundation of their home did not demonstrate that Paul Block: (a) knew that the foundation was defective; (b) knew that the foundation would cause harm to the Fierthalers or their property; (c) intended to harm the Fierthalers or their property; or (d) acted out of malice.

On December 23, 1998, the Fierthalers filed a supplemental affidavit (the “Supplemental Affidavit”) of their attorney, which included copies of the deposition of a John McManus (“McManus”), a mason who worked as a subcontractor to Block Brothers in connection with the construction of the foundation of the Fierthaler’s home. As part of that deposition, McManus testified that Block Brothers did not know what it was doing in connection with the construction of the foundation.

On February 12, 1999, the Fierthaler’s attorney filed an additional affidavit (the “Attorney’s Affidavit”) which alleged that: (1) the decisions of a number of Bankruptcy Courts, including the decision in *In Re Mones*, 169 B.R. 246 (Bankr. D.C. 1994)(“*Mones*”) held, contrary to *Rifkin*, that to support a cause of action under Section 523(a)(2)(A), a debtor need not directly obtain property, money or services; (2) in connection with the Fierthaler’s cause of action under Section 727(a)(2)(A), there was no evidence presented by Paul Block which indicated that he was legally liable for the amounts that David Block may have loaned to Block Brothers at the time he executed the Confession of Judgment; (3) in connection with the Fierthaler’s cause of action under Section 727(a)(3), the failure of Paul Block to produce copies of his personal income tax returns and canceled checks made it impossible to determine his financial condition and business transactions; (4) in connection with the Fierthaler’s cause of action under Section 727(a)(5), without producing

all of the records concerning his personal bank accounts and his tax returns, Paul Block had failed to provide a full explanation of his assets so that it could be determined whether any assets had been lost; and (5) the deposition testimony of various subcontractors who worked on the Fierthaler's home clearly indicated that: (a) Paul Block was in charge of the construction of the foundation; (b) the foundation was defective; (c) Paul Block knew the foundation was defective as it was being constructed and when it was completed; (d) Paul Block concealed the defects in the foundation from the Fierthalers and allowed them to continue to make payments to Block Brothers; and (e) the construction was so defective in the face of protestations by the subcontractors, that a trier of fact could infer malice on the part of Paul Block.

## **DISCUSSION**

### **I. Summary Judgment**

Under Federal Rule of Civil Procedure 56(c), judgment “shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” The Rule is clear in “provid[ing] that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact.” *Repp v. Webber*, 132 F.3d 882 (2nd Cir. 1997) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986) (further citations omitted)).



Further, as a general rule, all ambiguities and inferences to be drawn from the underlying facts should be resolved in favor of the party opposing the motion, and all doubts as to the existence of a genuine issue for trial should be resolved against the moving party. *Brady v. Town of Colchester*, 862 F.2d 205, 210 (2nd Cir. 1988) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 330 (1986) (further citations omitted)). However, the non-moving party “must do more than simply show that there is some metaphysical doubt as to the material facts.” *Repp*, 132 F.3d at 889 (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)).<sup>3</sup>

The duty of a Court on a motion for summary judgment is to determine whether there are any genuine issues of material fact to be resolved by trial, and not to decide factual issues. As the Second Circuit has aptly stated: “In this regard, the Court’s task is issue identification, not issue resolution. In performing this task, we must assume the truth of the non-movant’s evidence.” *Repp*, 132 F.3d at 890; see also *Anderson*, 477 U.S. at 249.

The moving party, however, does not bear the burden of proving that his opponent’s case is “wholly frivolous.” *Brady*, 863 F.2d at 210; see also *Celotex*, 477 U.S. at 323-26. The Second Circuit in *Brady* further stated that: “In *Celotex*, the Supreme Court made it clear that in cases where the non-movant will bear the ultimate burden of proof at trial on an issue, the moving party’s burden under Rule 56 will be satisfied if you can point to an absence of evidence to support an essential element of the non-moving party’s claim.” *Brady*, 863 F.2d at 210-11.

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<sup>3</sup> This Court is mindful that factual materiality is governed by reference to the applicable substantive law. *Repp*, 132 F.3d at 890. In this case, of course, references are to the substantive law governing actions for breach of contract, fraud, and third party beneficiaries. See Sections II-IV below.

In his Motion for Summary Judgment, Paul Block, as the moving party, has attempted to demonstrate that the evidence presented by the Fierthalers in the Adversary Proceeding, including their submissions in opposition to the Motion for Summary Judgment and in their Cross-Motion, is insufficient as a matter of law to establish their causes of action. If a moving party like Paul Block is successful in demonstrating this, the burden shifts to the non-moving party, in this case the Fierthalers, to come forward with persuasive evidence that their claims are not “implausible.” *Brady*, 863 F.2d at 211. “In evaluating the sufficiency of the non-moving party’s evidence, however, courts must still proceed very cautiously.” *Id.* The Court must employ the same analysis in deciding the Cross-Motion.

With these considerations in mind, I have examined: (1) each of the Fierthalers’ causes of action and the evidence that they have presented in support of those causes of action in the Cross-Motion and in opposition to the Motion for Summary Judgment; and (2) the evidence presented by Paul Block in the Motion for Summary Judgment and in opposition to the Cross-Motion.

## **II. The §523(a)(2)(A) and the §523(a)(6) Causes of Action**

The Fierthalers have asserted that, should it be determined in the State Court Action that Paul Block is indebted to them because he is liable for all or part of the damages incurred as the result of the dangerously defective foundation constructed at their home by Block Brothers, the indebtedness should be determined to be non-dischargeable under Sections 523(a)(2)(A)<sup>4</sup> and 523(a)(6).<sup>5</sup> In the

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<sup>4</sup> Section 523(a)(2)(A) provides that:

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt—

(2) for money, property, services, or an extension, renewal, or refinancing of

Motion for Summary Judgment, Paul Block has asserted that, notwithstanding that he: (1) may have known that the Fierthaler's foundation was being constructed in a seriously defective manner; (2) intentionally allowed the construction to proceed; and (3) with that knowledge and intent, allowed the Fierthalers to continue to make progress payments to Block Brothers, as a matter of law: (a) since he only acted as a corporate officer and director of Block Brothers, who did not directly receive any of the funds paid by the Fierthalers, but at best only indirectly received a portion of the funds as salary or other compensation in connection with the services he performed for Block Brothers, any indebtedness to the Fierthalers could not be determined to be non-dischargeable pursuant to Section 523(a)(2)(A); and (b) because the Fierthalers had not demonstrated that he wilfully and maliciously injured them or their property any indebtedness to them could not be determined to be non-dischargeable pursuant to Section 523(a)(6).

In contending that the Fierthaler's cause of action pursuant to Section 523(a)(2)(A) should be dismissed because he did not directly receive the money that they paid as progress payments for

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credit, to the extent obtained by—

(A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition;

<sup>5</sup> Section 523(a)(6) provides that:

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt—

(6) for willful and malicious injury by the debtor to another entity or to the property of another entity;

the construction of their home, Paul Block relies on *Rifkin*. However, this Court believes the better view and rationale is the one set forth by the Court in *Mones* which holds that a debtor does not have to have personally received the money that was obtained by false pretenses, a false representation or actual fraud for a debt to be determined non-dischargeable under Section 523(a)(2)(A).<sup>6</sup>

It is clear from the information provided in the Adversary Proceeding, and in connection with the Motion for Summary Judgment and the Cross-Motion, that: (1) the foundation at the Fierthaler's home was constructed by Block Brothers in a seriously defective manner that was not in accordance with the specifications set forth in the contract entered into by the parties, and that as a result, the foundation must be completely demolished and reconstructed incorporating proper construction methods (See Report of Architect James A. Fleckenstein, Jr. at Exhibit D to the Cross-Motion); (2) subcontractors to Block Brothers who performed services in connection with the construction of the foundation were concerned about the methods of construction being employed, and expressed those concerns to representatives of Block Brothers at times when Paul Block was present at the construction site (See the Deposition of John McManus attached to the Supplemental Affidavit of Robert T. DiGiulio, Esq. filed on December 23, 1998 and the Deposition of Carl Turner, attached at Exhibit H to the Cross-Motion); (3) depending upon the actual extent of any knowledge that Paul Block may have had concerning: (a) the construction of the foundation; (b) the extent of the financial

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<sup>6</sup> As in *Mones*, it is not necessary in connection with this Motion for Summary Judgment for the Court to determine whether the better view is the view of the Court in *Mones*, described as a second view, which is that it is only necessary to show that the debtor benefitted in some way from the money obtained through fraud, or the third view, which is that it is not necessary for the debtor to have benefitted at all if he was responsible for money being obtained by fraud. In this case, the money was paid to Block Brothers and Paul Block was a principal of the corporation, so that he indirectly benefitted from the money obtained through the alleged fraud.

difficulties that Block Brothers and Mt. Morris Lumber were experiencing; (c) the impact of any such financial difficulties on him individually; and (d) the need for funds by Block Brothers and Mt. Morris Lumber, it may be that any actions Paul Block may have taken to allow the defective construction to continue or to induce or allow the Fierthalers to make progress payments despite the defective construction, may have been fraudulent and even wilful and malicious; and (4) although it has been contended by his attorneys that the construction was simply negligent or in breach of contract, Paul Block has failed to come forward, in an affidavit or otherwise, to explain the full extent of his knowledge with respect to the defective construction.

For the foregoing reasons, neither party has met its burden to demonstrate that there are no material issues of fact with respect to the Fierthalers' causes of action under Sections 523(a)(2)(A) and 523(a)(6) or that judgment can be entered as a matter of law. Therefore, the Motion for Summary Judgment and the Cross-Motion with respect to those causes of action must each be denied.

### III. Section 727(a) Causes of Action

#### a. Sections 727(a)(3) and 727(a)(5) Causes of Action

The Fierthalers have asserted that Paul Block's discharge should be denied pursuant to Sections 727(a)(3)<sup>7</sup> and 727(a)(5)<sup>8</sup>, because he failed to produce, at various times during the administration of his Chapter 7 case, copies of personal income tax returns, savings and checking account statements and canceled checks. From all of the evidence produced in connection with the Adversary Proceeding, the Motion for Summary Judgment and the Cross-Motion, and the fact that the Trustee did not file a Complaint under Section 727(a) prior to the Extended Bar Date, the Court finds that Paul Block has produced the necessary recorded information from which his financial

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<sup>7</sup> Section 727(a)(3) provides that:

(a) The court shall grant the debtor a discharge, unless—

(3) the debtor has concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information, including books, documents, records, and papers, from which the debtor's financial condition or business transactions might be ascertained, unless such act or failure to act was justified under all of the circumstances of the case;

11 U.S.C. § 727(a)(3) (1999).

<sup>8</sup> Section 727(a)(5) provides that:

(a) The court shall grant the debtor a discharge, unless—

(5) the debtor has failed to explain satisfactorily, before determination of denial of discharge under this paragraph, any loss of assets or deficiency of assets to meet the debtor's liabilities;

11 U.S.C. § 727(a)(5) (1999.)

condition and business transactions could be ascertained by the Trustee and his creditors<sup>9</sup>, and that any loss of assets or deficiency of assets to meet his liabilities has been explained to the satisfaction of the Trustee and the Court. Therefore, Paul Block's Motion for Summary Judgment with respect to the Fierthaler's Sections 727(a)(3) and 727(a)(5) causes of action is granted the Cross-Motion is denied, and those causes of action is dismissed.

b. Section 727(a)(4) Cause of Action

The Fierthalers have also asserted that Paul Block's discharge should be denied pursuant to Section 727(a)(4) because he made a false oath when he failed at a Section 341 meeting to disclose that he had a Marine Midland Bank savings account, was receiving income from some lakefront rental cottages, and was still receiving money from Mt. Morris Lumber.

From the information produced in connection with the Adversary Proceeding and the Motion for Summary Judgment and the Cross-Motion, it appears that Paul Block has met his burden to demonstrate that he did not make a false oath within the meaning and intent of Section 727(a)(4) with regard to the existence of a material asset<sup>10</sup>, because it appears that: (1) he did not have a Marine Midland Bank savings account balance at the time of the filing of his petition; (2) the rental cottages in question were not owned by him, but by Block Brothers or Mt. Morris Lumber; and (3) he was not receiving income from Mt. Morris Lumber at the time of the filing of his petition. Therefore, Paul Block's Motion for Summary Judgment with respect to the Fierthalers' Section 727(a)(4) cause of action is granted, the Cross-Motion is denied, and that cause of action is dismissed.

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<sup>9</sup> See *Hart*, at page 28-29.

<sup>10</sup> See unpublished decision in *In Re Pierri*, (Case No. 97-20461, dated 4/21/98) for the elements necessary to prove a cause of action under Section 727(a)(4).

c. Section 727(a)(2) Causes of Action

The Fierthalers have finally asserted that Paul Block's discharge should be denied pursuant to Section 727(a)(2) because when he: (1) executed the Confession of Judgment in favor of his brother, David Block, and acknowledged liability for an indebtedness of Block Brothers that he was not legally liable for; and (2) allowed the Affidavit of Confession of Judgment to be recorded and become a lien on his residence within one year before the filing of his bankruptcy petition, there was a transfer made with intent to hinder, delay or defraud his legitimate creditors.

Once again, Paul Block has failed to come forward, in an affidavit or otherwise, to fully explain the facts and circumstances surrounding his execution of the Confession of Judgment in order to demonstrate that, when it was filed and became a lien on his residence, the resulting transfer was not made by him, in cooperation with his attorneys and other family members, with the intent to hinder, delay or defraud his legitimate creditors. No evidence has been provided by Paul Block to demonstrate why he was legally liable for the loans David Block made to Block Brothers. Therefore, it appears that there may have been no consideration for his execution of the Confession of Judgment, so that when it was allowed to be recorded and become a lien upon his residence, it may have been done with the actual intent to hinder, delay or defraud creditors by sheltering the little non-exempt equity that Paul Block may have still had in his residence. At the time the Confession of Judgment was executed and delivered, Mt. Morris Lumber was experiencing substantial financial difficulties<sup>11</sup>, as was Block Brothers.

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<sup>11</sup> It was only approximately 36 days later that an auction of all of the assets of Mt. Morris Lumber was conducted.



The Court could hold in connection with the Cross-Motion that it was Paul Block's burden to come forward with an explanation of all of the relevant facts and circumstances to avoid judgment being entered against him on this portion of the Fierthalers' Section 727(a)(2) cause of action. However, I believe that there exist material issues of fact and that it would be more in the interests of justice to deny the Motion for Summary Judgment and the Cross-Motion in order to afford Paul Block the opportunity to fully explain all of the facts and circumstances surrounding the execution and recording of the Confession of Judgment. At that time the Court can determine whether the transfer was made with the intent to hinder, delay or defraud his legitimate creditors.

The Fierthalers have also asserted that Paul Block's discharge should be denied pursuant to Section 727(a)(2) because he may have been involved in alleged pre-petition transfers or concealments of some of the assets of Mt. Morris Lumber or Block Brothers. To prevail on a cause of action under Section 727(a)(2), the property transferred or concealed must be property of the debtor.<sup>12</sup>

### **CONCLUSION**

The Motion for Summary Judgment with respect to the Section 727(a)(3), 727(a)(4) and 727(a)(5) causes of action, as well as the Section 727(a)(2) cause of action alleging possible fraudulent pre-petition transfers or concealments of some of the assets of the Mt. Morris Lumber and Block Brothers is granted, the Cross-Motion is denied, and those causes of actions are dismissed.

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<sup>12</sup> See Hart, at page 27.

The Motion for Summary Judgment and the Cross-Motion are each denied with respect to the Section 523(a)(2) and 523(a)(6) causes of action, and the 727(a)(2) cause of action alleging that the Confession of Judgment was a transfer made with the actual intent to hinder, delay or defraud creditors.

There will be a pretrial conference in the Adversary Proceeding on July 27, 1999 at 3:00 p.m.

**IT IS SO ORDERED.**

\_\_\_\_\_/s/\_\_\_\_\_  
**HON. JOHN C. NINFO, II**  
**U.S. BANKRUPTCY JUDGE**

**Dated: July 2, 1999**